

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KARL KENNEDY,

Defendant-Appellant.

UNPUBLISHED

September 14, 1999

No. 210385

Isabella Circuit Court

LC No. 97-008151 FH

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree child abuse, MCL 750.136b; MSA 28.331(2). He was thereafter sentenced to 12 to 22½ years' imprisonment as a second habitual offender, MCL 769.10; MSA 28.1082. Defendant appeals as of right and we affirm.

Defendant's conviction arose from an incident in which he burned his girlfriend's two-year-old son by submerging his face in a bowl of hot soup. Defendant claimed that the incident, which occurred while he was babysitting the child, was an accident.

I

A

Defendant first argues that the trial court erred in admitting testimony regarding defendant's prior conviction for third-degree child abuse. Whether to admit or exclude evidence of other bad acts is within the sound discretion of the trial court and this Court will not disturb the decision absent a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1). However, such evidence may be admissible for other purposes, such as providing proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident. *Id.* In

People v VanderVliet, 444 Mich 52, 55; 508 NW2d 114 (1993), our Supreme Court set forth a four-part standard for admissibility of other acts evidence under MRE 404(b), requiring:

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

In the present case, the prosecution sought admission of defendant's previous conviction for the purposes of showing intent, system in doing an act, and absence of accident. All three purposes are proper purposes for offering evidence of other bad acts. MRE 404(b)(1).

With regard to the relevance of the evidence, defendant claims that he did not issue a general denial to the charge and, therefore, the intent and absence of accident issues for which the prosecution seeks to use the evidence are not relevant. Regardless whether defendant issued a general denial to the charge, it is "well established in Michigan that all elements of a criminal offense are 'in issue' when a defendant enters a plea of not guilty." *Crawford, supra* at 389, citing *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995); see also, *VanderVliet, supra* at 83-84. Because defendant entered a plea of not guilty, all the elements of first-degree child abuse were at issue and, thus, material. *Crawford, supra* at 389. The elements of first-degree child abuse are (1) the person in charge of a child, (2) knowingly or intentionally, (3) causes serious physical or mental harm to a child. *People v Gould*, 225 Mich App 79, 87; 570 NW2d 140 (1997). First-degree child abuse is a specific intent crime. *Id.* at 86. Therefore, defendant's intent was at issue.

Defendant's previous conviction also involved a young boy whom defendant was babysitting. Further, defendant was convicted of abusing that child by way of burning the child with hot tea. In that case, defendant also claimed that the child accidentally burned himself by spilling the tea over his head. This case also involved a young boy, whom defendant was babysitting, and whom defendant alleged burned himself by spilling hot soup on his head. The strong similarity between the crime charged here and the circumstances surrounding defendant's previous conviction for child abuse render evidence of the previous conviction probative to show that defendant's conduct here was intentional. See *VanderVliet, supra* at 79-80 (the similarity between the testimony of another alleged victim of the defendant's sexual abuse and of the subject victim was probative of the defendant's intent with regard to the subject victim). Because the circumstances surrounding defendant's previous conviction are almost identical to those surrounding the crime charged, defendant's previous conviction was relevant to show defendant's intent.

Although the evidence of defendant's previous conviction was relevant to show defendant's intent, that alone does not support the trial court's admission of the conviction. The probative value of the evidence must also not have been substantially outweighed by its potential for unfair prejudice. *VanderVliet, supra* at 55; MRE 403. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford, supra* at 398. In this case, as previously discussed, defendant's prior conviction was highly relevant to defendant's intent in the instant case because of the similarity between the previous conviction and the

crime charged. See *id.* at 395. Therefore, unlike, *Crawford, id.* at 398-399, where our Supreme Court found that the evidence of a previous conviction was more prejudicial than probative because the primary inference raised by the evidence was impermissible character evidence, here the evidence was highly probative of defendant's intent and not his bad character alone.

Lastly, the trial court gave a cautionary instruction instructing the jury of the limited purposes for which the other acts evidence could be used. Accordingly, the trial court did not abuse its discretion by admitting evidence of defendant's previous conviction of third-degree child abuse for the purpose of showing defendant's intent in committing the specific intent crime of first-degree child abuse.

B

Defendant also challenges the prosecutor's use of the prior conviction during closing argument, specifically objecting to the prosecutor's comment that defendant's testimony that he did not commit the crime was not believable because of the prior conviction and similarity of the crimes. There is no error here because the prior act was properly admitted and a prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to the theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), and a prosecutor may argue from the facts that the defendant was not worthy of belief, *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

II

Defendant next argues that the trial court erred by permitting the prosecution to impeach his testimony with evidence of defendant's previous convictions for falsifying a driver's license. Whether to permit impeachment with prior convictions is within the sound discretion of the trial court and this Court will not disturb the decision absent an abuse of discretion. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995).

A witness' credibility may be impeached with prior convictions, MCL 600.2159; MSA 27A.2159, but only if the convictions satisfy the criteria set forth in MRE 609. *People v Nelson*, 234 Mich App 454, 460-461; 594 NW2d 114 (1999). MRE 609(a) provides:

General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

The trial court admitted evidence of defendant's two previous convictions for providing a false driver's license to the police, MCL 257.324; MSA 9.2024, pursuant to MRE 609(a)(1). Because crimes of dishonesty or false statement are directly probative of truthfulness, they are admissible under MRE 609(a)(1) without regard to the balancing test of MRE 609(a)(2)(B). *People v Allen*, 429 Mich 558, 605-606; 420 NW2d 499 (1988). Likewise, MRE 609(a)(2)(A) is inapplicable when the conviction was for a crime of dishonesty.

The issue, then, is whether furnishing a false driver's license to the police is a crime that contains an element of dishonesty or false statement. In *People v Parcha*, 227 Mich App 236, 243; 575 NW2d 316 (1997), this Court explained that the type of crimes contemplated by MRE 609(a)(1) "could be identified by the fact that they did not merely imply dishonesty on the part of the perpetrator, but incorporated a dishonest act, such as active deceit or falsification, as an element of the offense itself. Being convicted of such an offense did not imply dishonesty, but reflected it." MCL 257.324(1)(h); MSA 9.2024(1)(h) prohibits a person from furnishing "to a peace officer false, forged, fictitious, or misleading verbal or written information identifying the person as another person" On its face, convictions for this offense involve a crime that incorporates both active deceit and falsification as an element of the crime itself. Therefore, the trial court did not abuse its discretion by allowing the prosecution to impeach defendant with these convictions.

III

Defendant lastly argues that his sentence is disproportionate because, although the crime in this case was serious, the victim was not permanently injured. We seriously dispute that contention based, minimally, on the obvious long-term psychological impact on the child. Defendant also claims that his sentence is disproportionate because his prior record includes "only" one prior felony and several minor traffic offenses. However, defendant's prior felony conviction was for third-degree child abuse and he was sentenced to sixteen to twenty-four months in prison after violating the probation terms on the conviction. In addition, that conviction followed an assault and battery conviction that resulted from defendant's abuse of the victim's mother regarding the third-degree child abuse conviction. Defendant's probationary term for the assault and battery conviction was also revoked and a subsequent prison term was imposed.

Given the very serious nature of the crime, defendant's criminal history, defendant's inability or unwillingness to reform, the fact that defendant's sentence as a second habitual offender is not contemplated by the sentencing guidelines, and that the sentence is within the

statutory limits established by the Legislature, we conclude that the trial court did not abuse its discretion in sentencing defendant to a term of 12 to 22½ years. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).

Affirmed.

/s/ Richard A. Bandstra

/s/ Kathleen Jansen

/s/ William C. Whitbeck